

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S BRIEF
AND
APPENDIX**

77-1167

In The
United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

LOUIS CARINI,

Defendant-Appellant.

Appeal From Orders and Judgment of
Conviction in the United States District Court
for the Western District of New York

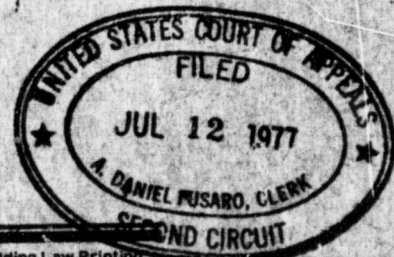
BRIEF FOR APPELLEE AND APPENDIX

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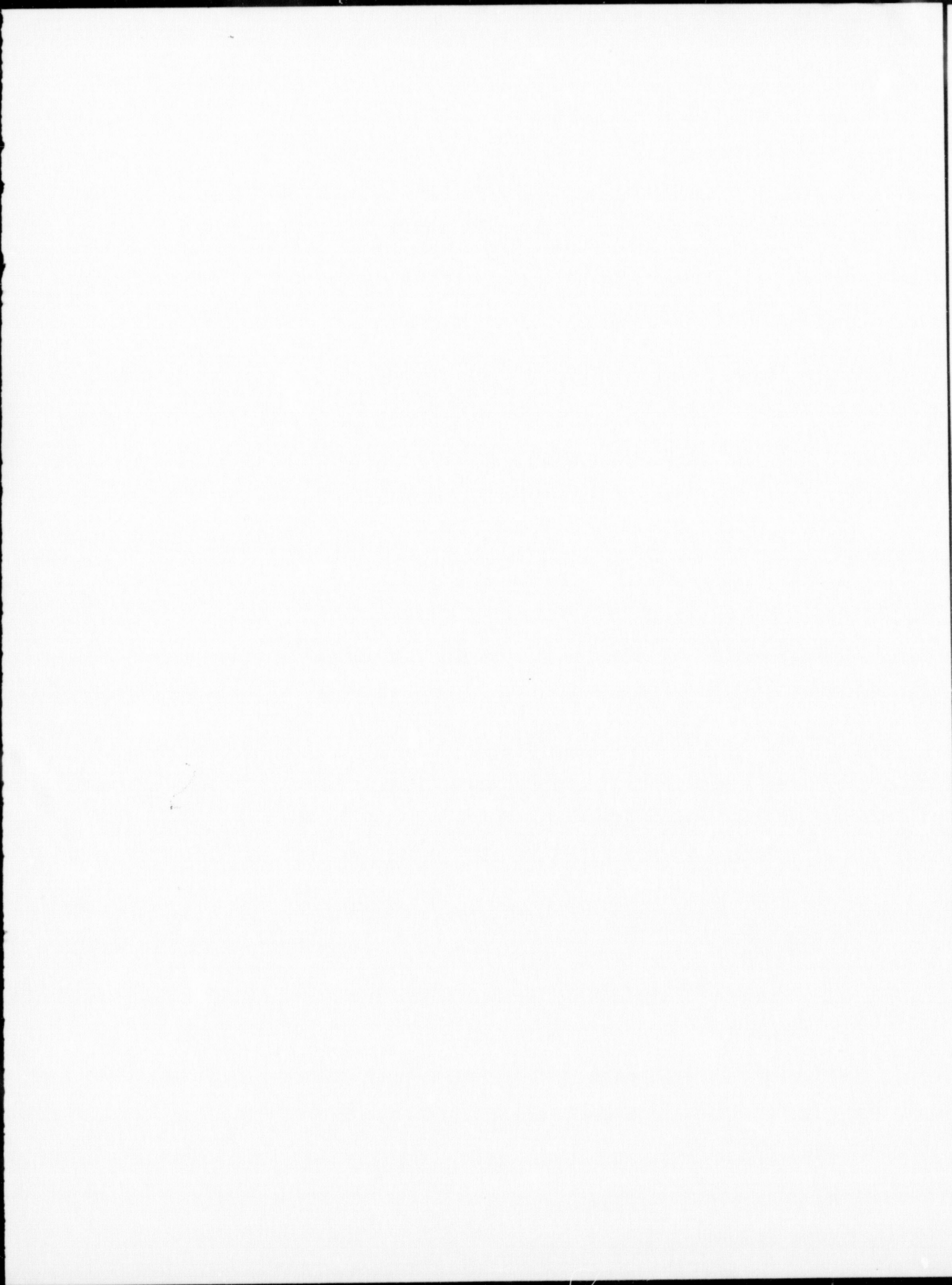
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Issues Presented*

In the opinion of the Appellee, the following issue is presented:

Whether an accused's Constitutional right to a speedy trial is violated where there is almost full compliance with the Second Circuit and Western District Plans for Prompt Disposition of Criminal Cases and substantial compliance with the Speedy Trial Act and the trial nevertheless was held thirty-four months after the information was filed.

*This case has not previously been before this Court.



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Counterstatement of the Case

On January 31, 1977, Louis Carini was convicted on ten misdemeanor counts of failing to deposit, into a trust account, taxes withheld from employee's wages in violation of Title 26, United States Code, Section 7215.

The trial date was fixed by Government's motion on December 13, 1976. The date scheduled was January 27, 1977. The trial began as scheduled and seven witnesses testified during the trial. On January 31, 1977 the jury returned its verdict of guilty on all counts.

On February 28, 1977 the defendant was fined \$500.00 on each count, with the fine remitted on all counts except one.

Counterstatement of the Facts

Louis Carini is President of Carini Construction Company. This company was and is engaged in building construction and employed some twenty-three employees during the period in question. (Tr. 65).^{*} As an employer of labor, he was required to collect, account for and pay over to the United States the Federal Insurance Contributions Act (FICA) tax and federal income taxes withheld from wages of his employees.

Because Carini, as responsible officer, failed to pay over the taxes he withheld from employees' wages for quarters ending June 30, 1972; September 30, 1972; June 30, 1973; September 30, 1973 and December 31, 1973, he was considered delinquent. Pursuant to Title 26, United States Code, Section 7512, Louis Carini was personally served a formal notice which required him to collect the FICA and income taxes from employees' wages and deposit them in a trust account for the benefit of the United States within two business days from the date of collection. (Tr. 3-14; App. 2-13). For each date the defendant failed to make the required deposit he was charged with a separate misdemeanor violation.

The ten-count information was filed on March 15, 1974. The arraignment was held on March 25, 1974 when the defendant entered a plea of "not guilty" on each count and was released on his own recognizance.

The Government submits that the Court records are incomplete as to the reasons for the delay. Therefore, many of the dates and circumstances have been reconstructed from various records, notes and references not contained in the official records of this case. This method of documentation is admittedly unusual, but is necessitated by reason that the caselaw has imposed on the Government the burden of justifying all

^{*}"Tr." refers to the trial transcript. "App." refers to the Government Appendix. The number appearing after these references refer to the pages.

periods of delay in trial. The Government concedes that this burden is justified in view of policy underlying the Speedy Trial Act. However, until recently, the scheduling of trial dates and the reasons for delay did not require specific documentation in the record. Thus, in evaluating delays, the Government must rely on what are admittedly incomplete records. While there is some danger in the Court's reliance on such a record, the unusual circumstances of the situation would justify this reliance. This is especially true where the adversary system provides substantial protection against inaccurate statements.

The following "Statement of Significant Dates" sets forth the Government's position herein.

Statement of Significant Dates

Date	Action	Explanation
3/15/74	Information filed	Section 4.(a) of the Western District Plan for Prompt Disposition of Criminal Cases requires that defendant be arraigned within 10 days of the date the Information was filed.
3/25/74	Defendant arraigned	Within 10 days the defendant is arraigned and is released on his own recognizance. (App. 14).
5/13/74	Motion to fix trial date	The Government first declared it is ready for trial (App. 14-16).
5/28/74	Motion to fix a date for trial	Government declares it is ready for trial, but indicates to the Court that there was a possibility of a plea. (App. 14). The terms of the plea offer were that the defendant's corporation would be allowed to enter a plea to one-third of the charges in full satisfaction of the personal charges against Carini. This plea was conditioned upon the defendant being current on all tax liability to the I.R.S. and demonstrating that he was continuing to pay his taxes in a timely manner. (App. 17-19). The defendant was then given time to demonstrate his good conduct.

- 7/—/75 Plea offer retracted by Government some-time in July, 1975. The defendant never paid his back taxes and, in fact, continued to incur further tax liability to the Government for withholding taxes (Tr. 131-133, App. 20-22). The offer was then retracted by the Government because it was not permitted by the Department of Justice and the defendant's attorney was orally notified of this on several occasions. (App. 17-19).
- 8/1/75 District Court in
to Summer recess
8/31/75
- 9/17/75 Letter to Defendant's Attorney with motion to fix a trial date and plea offer. The Government filed a motion for trial on this date and notified the defendant of a new plea possibility. (App. 23).
- 10/14/75 Return date of Motion to fix a trial date This motion was adjourned to October 23 to allow defendant to make a motion. (App. 14; 24-26).
- 10/28/75 (a) Government's motion to fix a trial date.
(b) Defendant moved to dismiss based upon a denial of speedy trial These motions were adjourned to November 10, 1975 because the defendant's attorney was out of town (App. 27-29). This was the first time the defendant expressed any interest in a speedy trial.
- 11/7/75 Government filed a response to the defendant's motion to dismiss. This motion was submitted for decision on November 24, 1975. Government requested a denial of defendant's motion and a prompt trial date.
- 11/4/75 Judge Burke was
to hospitalized and
11/23/75 out of the office for this period. This delay should be considered institutional and, therefore, neutral.
- 11/24/75 Motions submitted The government's motion to fix a prompt trial date and deny defendant's motion to dismiss. The government's request and the defendant's motion to dismiss were submitted for decision on this date. (App. 30-34).

3/3/76	Order denying defendant's motion to dismiss	
5/10/76	Government's motion to fix a trial date	This motion was adjourned at the request of the defendant's attorney. This attorney, retained by the defendant, was asking to withdraw from the case. The defendant then requested a court-appointed attorney.
5/27/76	David G. Larimer, Esq. appointed by the Court to represent the defendant.	Since the new lawyer was just appointed to represent the defendant, the Government agreed to withdraw its motion and file a new motion. (Court Docket, May 24, 1976)
6/13/76 to 6/22/76	Judge Burke hospitalized	Institutional delay.
8/1/76 to 8/31/76	District Court in Summer recess	
9/16/76 to 11/8/76	Judge Burke hospitalized and convalescing	No cases were able to be heard in Rochester during this period. Judge Henderson had died leaving his caseload to Chief Judge Curtin. Judge Elfvin was unable to hear this case because he was the U.S. Attorney when the Information was filed.
10/4/76	Government's Motion to Assign Judge	Due to the continued illness of Judge Burke, the Government moved to have a new judge assigned to hear this case. This motion disclosed a caseload of some 43 cases. Most of these cases had to be tried before December 27, 1976 under the Speedy Trial Act (App. 34-43).
12/13/76	Government's motion to fix a trial date	Since Judge Burke had returned to the bench and was hearing cases, the Government again moved the case for trial. Due to the heavy caseload, the earliest date this case could be heard was January 27, 1977 (App. 14-16; App. 44-47).

1/14/77	Defendant's motion for Discovery and Inspection	Although this motion was filed after a firm trial date had been fixed, the Government agreed to all discovery in order to avoid a delay in the trial.
1/27/77	Oral motion to dismiss for lack of speedy trial	This motion was denied by Judge Burke (App. 47).
1/27/77	Trial	
1/31/77	Jury Verdict — Guilty on all counts.	

ARGUMENT

POINT I

The Government substantially complied with the Speedy Trial Act.

The various provisions of the Speedy Trial Act dictate specific time limits within which a defendant must be tried. On analysis, the substance of Title 18, United States Code, Sections 3161(b) and (g), when read in conjunction with Section 3163(a)(2) is that all information filed prior to July 1, 1976 must be tried within 180 days of that date.

In this case, the trial commenced thirty days after December 27, 1976, the last day permitted under this Act. Although the trial did not commence within the 180-day period, the delay was largely institutional and should not be treated with the same severity as other delays over which the Government has direct control. *Barker v. Wingo*, 407 U.S. 514 (1972); *U.S. v. Roberts*, 515 F.2d 642 (2nd Cir. 1975). Furthermore, the serious and undesirable sanction of dismissal should not be imposed where there is substantial compliance with the very new Act.

In support of this position the Government submits that:

1. *By failing to request a more prompt trial on December 13, 1976, the defendant has waived the 31 days of non-compliance with the Speedy Trial Act.*

The defendant's attorney was present on December 13, 1976 when the trial date was fixed. If the defendant objected to delay beyond the allowable 180 days, the time for him to register his objection was at this hearing. If he had done so, perhaps an earlier date could have been set. Instead, the defense attorney's only remark after the Court set trial date was "Thank you, Your Honor." (App. 44-46).

This Court must not allow the defendant to sit silently through 180 days and then obtain a dismissal solely because the trial was not held. The adage that "the squeaky wheel gets the grease" may well apply in order to give fair interpretation to the Speedy Trial Act. Obviously, every case cannot be tried at the same time. However, if a defendant feels he wants a prompt trial he should be required to put the Court and prosecution on notice in some way other than by operation of law. In that way, the case could be given some priority over the other equally important cases also requiring a prompt trial. On December 13, 1976, the Court fixed trials in 12 cases. Some of these cases were older than the Carini case and most involved more serious charges. Appellant said nothing to indicate any concern for a speedy trial after July 1, 1976 until the day of trial.

2. *Institutional delay accounts for more than four months of time during the 180-day period.*

Due to an unexpected serious illness of Judge Burke the trial was not held during the period from September 16 to November 8, 1976. Judge Burke was absent from the bench throughout this 7-week period. Because of its concern for the Speedy Trial Act, the government petitioned Chief Judge Curtin to assign a Judge to Rochester to hear the pending cases. (App. 34-44). Since Judge Elfvin had been U.S. Attorney at the filing of the

Carini information, he was unable to hear this case. Chief Judge Curtin was extremely busy because he had inherited the caseload from Judge Henderson who had died unexpectedly in 1975. As such, only a visiting judge could cure this difficult situation. Before a visiting judge could be assigned, Jude Burke returned to the office and after a short period of light work, began to hear trials. On December 13, 1976, the Government moved this case for trial on papers filed the previous week. (App. 14-16).

It should be noted that on December 13, 1976, not only did the Government move this case for trial, but numerous others. Some of these cases were older in time than Carini's and had to be tried promptly under the Speedy Trial Act. On December 13, 1976 the Court scheduled trials in 12 cases. Given the circumstances of having deadlines in all cases; the approach of the Christmas and New Year's holidays and the actual trial time needed in the older cases, the Carini case was scheduled at the earliest possible trial date. In spite of this, the trial was held within 31 days of the required time. This delay should be considered institutional and neutral.

In addition to the delay set forth above, the Court was in summer recess throughout August, 1976. Since the total institutional delay from July 1, 1976 to trial was at least 131 days, a delay of 31 days after the allotted time would seem excusable. If this delay is not excusable, at least it does not require the very strong and undesirable act of dismissing the charges.

While it is true that institutional delays are chargeable to the Government, "they are not appropriately treated with the same severity as delays procured by the prosecution." *U.S. v. Roberts*, 515 F.2d 642 (2nd Cir. 1975). In considering this issue in *Barker v. Wingo*, 407 U.S. 514 (1972) the Supreme Court said:

A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. 407 U.S. at 531.

While certainly the Government can validly be charged with delay here, there is no way the Government could reasonably be accused of not pushing this case for trial. In addition, there is no claim that the Government sought a delay for any tactical advantage.

Considering these arguments, the Government submits that it has substantially complied with the Speedy Trial Act. In view of this, the severe sanction of dismissal of the charges should not be allowed.

In this regard, the sanction of dismissal under the Speedy Trial Act is not required until July 1, 1979. 18 U.S.C. §3163(c). Since Congress recognized that this Act should be enforced gradually, surely this Court should recognize that a very strict interpretation at this stage of the implementation would be contrary to legislative intent. *1974 U.S. Code Cong. and Ad. News 7401.*

Finally, given the waiver by the defendant and presence of institutional delays in this period, there can be no valid argument that the defendant's rights under the Speedy Trial Act were violated.

POINT II

The Government substantially complied with the Second Circuit and the Western District Plans for Prompt Disposition of Criminal Cases and Rule 48(b) of the Federal Rules of Criminal Procedure.

1. *Second Circuit Plan*

Rule 4 of this Second Circuit Plan provides, in pertinent part:

In all cases the government must be ready for trial within six months from the date . . . of a formal charge upon which the defendant is to be tried. . .

Here the Government made its motion to fix a date for trial on May 28, 1974, some 64 days after the defendant was arraigned. Furthermore, this is not an instance where the Government filed a "pro-forma" notice of readiness; the Government actually moved this case for trial. (App. 14-16).

Although this plan requires the Government to declare its readiness for trial within six months, it does not require the trial to take place within that period.

There can be no valid claim that the Government did not comply with the Second Circuit Rules for promptly disposing of criminal cases.

2. *Western District Plan for Prompt Disposition of Criminal Cases.*

Much of the plan in the Western District of New York is identical to that of the Second Circuit. As such, even under a strict construction of these Rules, the Government submits that it is in substantial compliance with this plan. The argument submitted above is adopted here.

However, Rule 5(a) of this plan requires the trial to commence in this case by December 27, 1976. This would be the same date required under the Speedy Trial Act. The Government submits that the arguments included in Point I of this brief address this issue squarely. These arguments are adopted here.

3. Rule 48(b) Federal Rules of Criminal Procedure

Rule 48(b) of the Federal Rules of Criminal Procedure was designed to implement the right to a speedy trial. The rule is a mere restatement of the "inherent power of the court to dismiss a case for want of prosecution." Committee Note to Rule 48, 8A *Moore's Federal Practice*, ¶48.01.

Rule 48(b) is merely a skeleton which the Speedy Trial rules "flesh out" giving content to its sweeping language "by substituting a precise, albeit still flexible, six month rule." *Hilbert v. Dooling*, 476 F.2d 355, 361 (2nd Cir. 1973).

It is submitted that since Mr. Carini was afforded his right to a speedy trial as promulgated by the Second Circuit Rules and the Western District Plan, *supra*, it follows that he received the right to a speedy trial guaranteed by Rule 48(b).

POINT III

The Government did not violate the Defendant's right to a speedy trial guaranteed by the Sixth Amendment.

In *Barker v. Wingo*, 407 U.S. 514 (1971), the Supreme Court set out the criteria by which the Sixth Amendment right to a speedy trial is to be judged. In establishing the four factors to be weighed, the Court went on to say:

We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather they are related factors and must be considered with such other circumstances as may be relevant.

Barker v. Wingo, 407 U.S. at 533.

It is respectfully submitted that under any test, the Government did virtually everything it should have done to bring this case to trial. Furthermore, the Government never asked for a continuance for any reason and during the thirty-four months between indictment and trial, the motion to fix the case for trial

appeared on the calendar eight times. In considering this issue, the Court should evaluate the four factors identified in *Barker*:

- (1) the length of delay
- (2) the reason for the delay
- (3) the defendant's assertion of his right and
- (4) the prejudice to the defendant from the delay. 407 U.S. at 530.

1. *Length of Delay*

The length of delay here was 34 months from indictment to trial. While this period certainly would trigger the inquiry under *Barker*, there are no particular circumstances in this case that would create constitutional infirmity. This time, although protracted, is not, by itself, *per se* excessive.

In fact, the courts have held that similar periods of delay do not violate the Sixth Amendment. See: *Barker v. Wingo*, 407 U.S. 514 (1971) (65 months from indictment to trial); *U.S. v. Saglimbene*, 471 F.2d 16 (2nd Cir. 1972), *cert. denied*, 411 U.S. 966 (1973) (6 years from trial to indictment); *United States v. Fasanaro*, 471 F.2d 717 (2nd Cir. 1973) (four years).

In evaluating post-information delay, the Second Circuit has also considered pre-information delay. *U.S. v. Vispi*, 545 F.2d 328 (2d Cir. 1976). The pre-trial delay in this case was short. In *Vispi*, this Court weighed heavily the long period (four to five years) of pre-information delay in its determination that the twenty-month post-information delay was excessive. In the instant case the entire pre-information delay was only about four months. This is an important distinguishing factor from the *Vispi* case.

2. Reason for Delay

The Government's motions to set date for trial appeared on the court calendar eight times. (App. 14-16). Therefore, the defendant had eight opportunities to insist that a trial date be set. The Government brought the first motion about a month and a half after arraignment. This shows the Government's readiness and desire for a speedy trial. Appellant would have this court believe that this motion is a *pro forma* motion which indicates nothing about the Government's readiness. On the contrary, the motion to set a date for trial was a definitive assertion to the court that the Government was ready and sought a prompt trial date. The appellant, in his brief asserts that his case was a simple one that was "essentially completed upon filing of the information." (Appellant brief p. 7). Yet he would have this court believe that the Government was not ready for trial when it brought its motion to set date for trial a month and a half after the filing. (App. 14-16). This argument is inconsistent.

The Government's motion for trial on May 28, 1974 did not result in a trial date because the Court was notified of a plea possibility. (App. 14-16). The apparent inactivity after that date until August, 1975 was due to the defendant attempting to take advantage of the plea offer. Under the terms of this offer, the defendant was required to become current on all tax liability and demonstrate an ability to remain current. In essence, this would be a demonstration of good conduct. (Title 18, U.S.C. §3161(h)(2) of the Speedy Trial Act recognizes that delay occasioned by the defendant attempting to demonstrate good conduct is a permissible excludable period.) In return for this, Carini's corporation would be permitted to plead guilty to 1/3 of the charges in full satisfaction of the personal charges against Carini. In July, 1975, following a Tax Conference in New Orleans, Louisiana, the Government became aware that the offered plea arrangement was not permitted by the Department

of Justice. The offer was promptly revoked by the Government. Since the District Court was in summer recess in August, the motion to fix a trial date was not made until September, 1975. At the same time the government offered a new plea agreement to the defendant. (App. 23). On the return of the motion to fix a trial date the defendant requested an adjournment in order to make a motion to dismiss on speedy trial grounds. (App. 24-29). The defense extended this adjournment to November 10, 1975. This motion was denied. (App. 15).

It should be noted that at no time during that period had the defendant ever moved for discovery or inspection. This indicates that he was not ready for trial throughout that period. This position is reinforced by the fact that, when the trial date was actually fixed, the defendant made a prompt effort to obtain full discovery by filing his motions returnable three days prior to trial. (App. 15). The only reason that the trial took place as scheduled was because the Government voluntarily agreed to all requests for discovery. (App. 15).

Given the fact of the plea possibility and the requirement that the defendant demonstrate "good conduct", the delay from June 1974 to September, 1975 should be discounted and not attributable to the Government. Cf. *U.S. v. Singleton*, 460 F.2d 1148 (2d Cir. 1972), *cert. denied*, 410 U.S. 984. Since the defendant was attempting to demonstrate good conduct, he had acquiesced to the delay by not pressing for trial.

Appellant argues that his motion to dismiss was not denied by Judge Burke for over four months after its filing. (Appellant's Brief 9). While this is literally true, it does not accurately reflect the four weeks adjournment requested by defense counsel (App. 24-33), two weeks because of the illness of Judge Burke, and the fact that the matter was not submitted until November 24, 1975. The delay attributable to judicial consideration was only three months. This is far less than the 17-month judicial delay which this Court criticized in *U.S. v. Vispi*, 545 F.2d 328, 333.

Furthermore, there was no other indication that the defendant Carini was seeking a speedy trial as was the defendant in *Vispi*. 545 F.2d at 334.

Appellant claims there is no evidence that he was not ready for trial at all times. (Appellant's Brief 12-13). However, the defendant did not even file his discovery motion until January 14, 1977. It is unlikely that the defendant was ready for trial prior to the completion of discovery. If he were, it would seem that there would be no need for this motion. Furthermore, the original defense attorney withdrew from the case shortly after the motion to dismiss was denied. Since the trial would be held shortly after the motion to dismiss, the withdrawal at this late date would seem to indicate more than mere coincidence.

A new lawyer was appointed for the defendant on May 27, 1976. (App. 15). After a reasonable period of time given to the attorney to familiarize himself with the case (Cf. App. 15 — Government withdrew its motion for trial on May 24 because a new attorney was to be appointed) the Government moved the case for trial.

Since the completion of the period of delay to allow this defendant to demonstrate good conduct, the Government moved this case for trial on three separate occasions. (App. 15). Surely, this demonstrates the Government's interest in obtaining a prompt trial.

Ever since April 30, 1974 the Government has been ready for trial. It has shown its readiness repeatedly as Government motions to set a trial date have appeared on the court's calendar eight times. The Government never asked for an adjournment in this case. In contrast, the defense has requested, caused or contributed to numerous adjournments and delays. Furthermore, the defense never once requested a trial date. Surely, if he were interested in a prompt trial he would have requested one by his own motion. If any motion in this case should be seen as "*pro forma*", it must be the defense motion for dismissal for lack of a speedy trial.



3. Defendant's Assertion of His Rights

The appellant never pressed for trial in this case. He merely waited for time to pass and then he moved for dismissal for lack of a speedy trial.

The Government concedes that most of the responsibility for a prompt trial should fall upon the prosecutor. However, it seems unfair to place complete responsibility on the Government, without any concurrent responsibility on the defendant to at least demand a prompt trial when he feels that the Government is unable or unwilling to go to trial after a reasonable period of time. Given the obvious institutional problems of not having sufficient trial judges, an increasing crime rate and caseload and a limited number of prosecutors, the defendant should not be allowed to sit silently and then obtain a dismissal solely because the trial was not held. Instead, then, the Court should require at least some timely activity by the defendant to assure his own rights to a speedy trial. Cf. *Barker v. Wingo*, 407 U.S. 514 (1971).

The defendant may be considered to have waived his right to a speedy trial. While the Courts are reluctant to find a waiver in situations where a Constitutional right is concerned, *Barker v. Wingo*, 407 U.S. 514 (1971); *Carnley v. Cochran*, 369 U.S. 506 (1962), that reluctance is overcome where the record supports the waiver.

In the instant case, the record is far from silent on the waiver of a speedy trial issue. Government motions to set a date for trial were before the District Court eight times. Appellant not only did not request a speedy trial, but he also acquiesced or contributed substantially to the pre-trial delay. While the Government did not request an adjournment, the defendant requested several adjournments. The defendant never moved this case for trial nor requested a prompt trial. Additionally, in the middle of the claimed 34-month delay, he allowed his attorney to withdraw and requested a new attorney. (App. 14-16).

Furthermore, in this defendant's motion to dismiss, he did not make an alternative motion for an immediate trial. In *Barker*, the Court found this fact significant and concluded that:

"the record strongly suggests that, while he hoped to take advantage of the delay in which he had acquiesced, thereby obtain a dismissal of the charges, he definitely did not want to be tried" 514 U.S. at 535

Surely the effect of these activities would support the claim that the defendant had waived his right to a speedy trial. The *Barker* Court stated that,

[T]he rule we announce today, which comports with constitutional principles, places the primary burden on the courts and the prosecutors to assure that cases are brought to trial. We hardly need add that if delay is attributable to the defendant, then his waiver may be given effect under standard waiver doctrine, the demand rule aside. 407 U.S. at 529.

Even if this Court finds no waiver in the case at bar, the Government submits that *Barker* requires that appellant's failure to request a trial must be given much weight in the balancing process.

4. *Prejudice to the Defendant*

The appellant claims that he suffered a great deal of prejudice due to the delay of his trial. In reality, the record supports the fact that he suffered little, if any, actual prejudice.

In support of this position, the government submits the following:

- a. The defendant's reputation remained excellent at trial as attested to by his character witnesses. He did not suffer the personal prejudice that worried the Supreme Court in *Klopper v. North Carolina*, 386 U.S. 213 (1967). In fact, appellant's reputation in the community remained excellent. (App. 49-52).

Hubert Morris and Nick Glamack, character witnesses for the defendant and members of his church testified that they didn't know of the charges against the appellant until a few days before trial. (App. 49-52). In addition, throughout the period in question, appellant continued in his post as a deacon of his church, a position of trust in the church. (App. 49).

b. Appellant's business dealings were not affected by the charges against him. Carini's suppliers were already familiar enough with him to demand cash in advance. (Tr. 153, 158). Carini's employees had already had the experience of banks not honoring their paychecks before the filing of the information. (Tr. 110). To say that Carini's relations with his business associates were poor may be true, but to say that this resulted from the tax charge is plainly ludicrous. There is no indication that any of Carini's employees or associates (other than Mrs. Carini) were interviewed during the entire investigation that preceded the information. (i.e. App. 59). There is no indication that anybody knew of the charges against Carini except his immediate family, the Government and anyone else Carini chose to tell. Carini's profession, unlike Vispi's law practice (*U.S. v. Vispi*, 545 F.2d 328) was not one in which the accused's associates could be expected to know of the pending charges. Carini's business was never interrupted because of any government action.

c. There was no showing that any witness was lost to the appellant.

d. There was no showing that the defense suffered any loss of records or dimmed memories. On the contrary, the appellant seemed to remember quite well at trial and all the pertinent records were well preserved. (Tr. 102-154). Moreover, a conclusory claim of dimmed memory is not sufficient to support a claim of prejudice. *U.S. v. Galardi*, 476 F.2d 1072 (9th Cir. 1973), cert. denied, 414 U.S. 839 (1973). One could expect that Mr. Carini would keep good records of that time period since he

had been informed of the I.R.S. investigation, and had obtained the services of an attorney, from the very start. (App. 57, 58). In addition, the criminal charges were filed within four months of the last violation contained in the information. As such, there was ample opportunity for appellant to prepare his defense while his memory was still fresh.

e. The defendant was never incarcerated. Although there certainly some psychological trauma which every defendant faces, it can hardly compare with the seriousness of the murder count faced by the defendant in the criminal case of *Barker v. Wingo*, 407 U.S. 514 where the Supreme Court found no violation of speedy trial rights despite Barker's ten-month imprisonment.

f. There is no indication that the long pendency of the criminal charges had an adverse affect on appellant's income. There is nothing in the record to indicate that appellant's construction business suffered at all due to the charges. While he was required to make weekly deposits of withholding taxes, the fact was that he did not meet these requirements. (App. 20-23). In fact, Mr. Carini garnered economic benefit during the pendency of this action because the Internal Revenue Service did not attempt to collect the taxes owed during this period.

g. There is no showing or claim that the delay was caused by the Government to gain tactical advantage over the defendant as in *U.S. v. Roberts*, 515 F.2d 642.

h. Appellant was found guilty after a full jury trial. There is no indication that the verdict would have been different had it been rendered earlier. In fact, the appellant was better off with respect to each of the alleged prejudices during the period that he was merely an "accused" than he is now, having been convicted of the crimes. In addition, a conviction tends to be much more public than an accusation.

These and other factors should be considered by the Court in considering whether the defendant suffered any serious prejudice by the delay in this case.

POINT IV**Defendant's Motion to Dismiss**

The defendant made a motion to dismiss based upon a denial of his rights to a speedy trial. This motion was renewed at the time of trial. In each motion, the defendant proffered almost identical arguments to those in this appeal. The motion was denied by Judge Burke, District Court Judge in Rochester.

It is submitted that this Court should not overrule the decision unless it is shown that Judge Burke was "clearly erroneous." Cf. *U.S. v. Maxwell*, 484 F.2d 1350 (5th Cir. 1953); *U.S. v. Gavic*, 520 F.2d 1346 (8th Cir. 1975). Given the fact that Judge Burke has been assigned to this case from the beginning and is familiar with the difficulty in obtaining a firm trial commitment from the defendant and his attorneys, his decision should be given even more weight. Cf. *U.S. v. Leonard*, 524 F.2d 1076 (2nd Cir. 1975). He of course, is in the best position to evaluate the situation as it unfolds rather than having to rely on an incomplete record with the clarity of hindsight.

CONCLUSION

The conviction should be affirmed in all respects.

Respectfully submitted,

RICHARD J. ARCARA

United States Attorney for the
Western District of New York

Attorney for the Appellee

233 U.S. Courthouse

Rochester, New York 14614

Telephone: (716) 263-6760

On the brief:

Gerald J. Houlihan

Assistant United States Attorney

APPENDIX



Excerpt from Testimony of Special Agent Ron Wheeler

A That's correct.

Q And then it shows how much time was put in, overtime, his regular wages, overtime wages, how much Social Security was withheld, and how much withholding taxes was withheld?

A Right.

Q And this is true of all the employees that you --

A Of all the employees in the book, right.

Q How many employees did you have records for?

A All of the ones that are in the book. I don't know the exact total, but I can total them right here.

Q How many are there?

A There are twenty-three employees.

MR. HOULIHAN: I offer Government's Exhibits 8 and 9.

MR. LARIMER: I object to Government's Exhibits 8 and 9. These are merely summaries prepared by the witness. I think the proper evidence is Government's Exhibit 7.

THE COURT: Objection is overruled.

(Government's Exhibits 8 and 9 marked in evidence.)

Q Calling your attention now to Government's Exhibit 8, I would like to ask you a few questions about the total amount of liability. Were wages paid to employees for the week ending September 13th, 1973?

*Excerpt from Testimony of
Revenue Officer Helen Sullivan*

MR. LARIMER: Very well, Your Honor.

Other than that, Your Honor, we are ready for trial.

(A jury was duly impaneled and sworn.)

(One alternate juror was sworn.)

(Mr. Houlihan made an opening statement on behalf of the Government.)

MR. LARIMER: Your Honor, the defense will reserve its opening statement until after the Government's proof.

THE COURT: If you don't make your opening statement now, you can't make it later.

MR. LARIMER: Your Honor, I believe I'm not required to make a statement until after the Government's case.

THE COURT: You are not required at all, but if you are going to make a statement, you will make it now, but not later. That is the rule of this court.

MR. LARIMER: Very well, Your Honor, I decline to make it at this time.

THE COURT: You don't have to make it.

MR. LARIMER: I know, Your Honor, but I think I am entitled to make it after the Government's case.

*Excerpt from Testimony of
Revenue Officer Helen Sullivan*

THE COURT: I have already ruled on it.
Start the case.

MR. LARIMER: Very well.

I have one further matter, Your Honor.
If there are any other Government witnesses
in the court, I would ask that there be a
ruling on the witnesses.

THE COURT: So ordered.

Do you have any prospective witnesses
in the court?

MR. HOULIHAN: The first witness is in
the court, and I would like to call Helen
Sullivan right now.

H E L E N S U L L I V A N ,

called as a witness by the Government, being first duly sworn,
testified as follows:

DIRECT EXAMINATION BY MR. HOULIHAN:

Q Mrs. Sullivan, by whom are you employed?

A Internal Revenue Service.

Q How long have you worked for the Internal Revenue Service?

A A little over fourteen years.

Q And what is your position with the Internal Revenue Service?

A I am a Revenue Officer.

Q What are the duties of a Revenue Officer?

A Collect taxes, secure tax returns and foster volunteer
complaints.

*Excerpt from Testimony of
Revenue Officer Helen Sullivan*

Q Are you stationed in the Rochester Office?

A Yes, I am.

Q Did there come a time in the course of your duties as a Revenue Officer that you were assigned to a case involving Carini Construction Company?

A Yes, there was.

Q Do you recall when that was?

A Approximately the latter part of '72 or the early part of 1973.

Q What was the basis for the assignment of that case to you?

A I was assigned with what we term "taxpayer delinquent accounts" for three quarters, that is, for three quarterly returns, which had not been paid.

Q The quarterly returns that were assigned to you, the delinquencies on the quarterly returns, for what purpose were these returns required to be filed?

A To report the tax withheld from employees' wages.

Q Are those referred to as 941 forms?

A That's correct.

Q At the time you were assigned to the case, what quarters were due and owing?

A The fourth quarter '71, second quarter '72 and third quarter of '72.

Q What was the total amount of liability that was due for those three quarters?

A \$4,836.48.

Q What kind of taxes are represented by that amount of money?

A That consists of FICA wages and income tax withheld from employees' wages.

Q And the FICA was what?

A Social Security.

Q After being assigned to that case, did there come a time that you made contact with Carini Construction Company?

A Yes.

Q And when was that, if you can recall?

A I would say the early part of 1973.

Q Was this personal contact or a telephone contact?

A I made what we call a "field contact." At that time Mr. Carini was conducting his business out of his home at 196 Deerfield Drive.

Q Did there come a time that you had a meeting with Mr. Carini concerning the payment of the back taxes that were due and owing?

A Yes. Sometime in April of 1973 I met with Mr. Carini and an agreement was set up whereby he would remit \$1,000 per month on the delinquent taxes starting May 15th, 1973.

Q He agreed to make these \$1,000 payments, is that right?

A Correct.

Q Was this to cure up some \$4,800 of liability?

A Right.

*Excerpt from Testimony of
Revenue Officer Helen Sullivan*

Q When was the first payment to be made?

A May 15, 1973.

Q And did you receive the \$1,000 payment on that day?

A I did not.

Q Did you receive any payments from Mr. Carini?

A On June 12th, 1973, the payment was made.

Q This was the payment that was due in May?

A In May, yes.

Q Was there a payment in June, the June payment?

A At that time he promised to make that payment on the following Friday; however, the payment was not received.

Q At the time that you met with Mr. Carini, did he give you an explanation why he had not paid this outstanding liability?

A He explained that prior to this time, due to adverse weather conditions, he was not able to perform in the construction business. And at that time he was also engaged in a service -- I believe he called it ReNuIt. It was something done to the house, on the exterior.

Q Like painting of some sort?

A Similar, I would think, and that because of the adverse weather conditions and being an external operation he would not be able to do this, but that business was booming now and he was sure that he would be able to do better in the future.

*Excerpt from Testimony of
Revenue Officer Helen Sullivan*

Q This was in the summer of 1973, is that right?

A Right.

Q You received a payment on June 12th, and there was going to be a payment on the following Friday, and you did not receive that payment. What, if anything, did you do after that?

A I went to Mr. Carini's place of business, and I believe at that time he was located in a building on Ridge Road, and I served him the L-54 letter.

MR. HOULIHAN: Would you mark this for identification?

(Government's Exhibit 1 marked for identification.)

Q Now what is the purpose of an L-54 letter?

A This is to advise the taxpayer that he has not been compliant with requirements prior to this time and that if he continued on like this, that we would have no alternative but to put him on monthly filing.

Q Now for a business the size of Mr. Carini's, at that time what were his filing requirements?

A He would be required to file a return on a quarterly basis and make deposits, or make Federal tax payments monthly.

Q I show you Government's Exhibit 1 marked for identification. Can you tell me what that is?

A This is a copy of the L-54 letter.

*Excerpt from Testimony of
Revenue Officer Helen Sullivan*

Q And this is the letter that you served on Mr. Carini at that time?

A That's correct.

Q This is dated June 28th, 1973?

A That's right.

MR. HOULIHAN: I offer G-1.

MR. LARIMER: No objection.

(Government's Exhibit 1 marked in evidence.)

Q The L-54 letter states:

"Although you have been advised a number of times to pay over the Social Security and income taxes withheld from your employees, you are still not making these payments as required by law. We again urge you to make these payments. If your payment record does not improve so as to meet the requirements of the law, we will have no alternative but to apply the provisions of Section 7512 of the Internal Revenue Code.

"This action would require you to deposit your withheld taxes in a special bank account within two banking days after you pay your employees their wages. And these deposits would have to remain in the bank until they are paid over to the Internal Revenue Service. It would also require you to file your payroll tax returns monthly instead of quarterly.

*Excerpt from Testimony of
Revenue Officer Helen Sullivan*

"We would like to avoid this drastic action, but unless there is substantial improvement in your payment record, we will have to serve formal notice requiring you to make special deposits of these taxes."

This is the letter, and that was served on what day?

A 6-28-73.

Q Was there a quarterly return required after June 28, 1973?

A Yes, for the period ending June 30th, 1973.

Q Was the return filed for the period ending June 30th, 1973?

A Yes, it was.

Q Was there payment along with that return?

A No, there was not.

Q Do you know what the estimated liability was at that time?

A Approximately \$4,000.

Q What, if anything, did you do after realizing that no payment had been made for the quarter ending June 30th, 1973?

A Since the taxpayer continued to incur another liability after he had been advised to remain current, there was no alternative but to serve the Form 2481 on him.

Q When was the Form 2481 served?

A August 24th, 1973.

MR. HOULIHAN: Would you mark this for identification?

(Government's Exhibit 2 marked for identification.)

*Excerpt from Testimony of
Revenue Officer Helen Sullivan*

Q I show you Government's Exhibit 2 marked for identification. Can you tell me what that is?

A That is the Form 2481, Notice to Make Special Deposits of Taxes.

Q This is directed to Carini Construction Corporation?

A That's right.

Q Is this the copy of the form that you delivered to Carini Construction Corporation?

A It is.

Q Would you tell us at the time that you delivered that where you delivered it and who was there?

A When I entered the building, Mrs. Carini was in the office, and since Mr. Carini was out on several occasions when I was there, and she was an officer of the corporation, I gave her the Notice and explained to her what the requirements were, that is, that a special tax deposit account should be opened, naming Mr. Carini as trustee for the United States Government and that he would be required to make deposits in a special account by the second banking day following the date that wages were paid to employees. And while I was explaining it to her, Mr. Carini walked into the office, and I reiterated the same information to him, and he stated that he understood his requirements, and he ended with a remark, "I knew this was going to happen."

*Excerpt from Testimony of
Revenue Officer Helen Sullivan*

Q This is Mr. Carini that said this?

A That's correct.

Q At the time that you served the original notice, who did you hand it to?

A The 2481?

Q Yes.

A To Mrs. Carini.

Did she acknowledge receipt of that?

A Yes, she did.

Q Did she sign an acknowledgment?

A Yes, she did.

Q And that is the second page of Government's Exhibit 2, is that correct?

A That's correct.

Q And your signature also appears on that page?

A That's right.

Q And it was after you handed it to her that Mr. Carini came in, is that right?

A That's right. Then I explained the requirements to him about depositing the taxes and so forth.

MR. HOULIHAN: I offer G-2.

MR. LARIMER: No objection.

(Government's Exhibit 2 marked in evidence.)

Q Mrs. Sullivan, at the time that you explained this to Mr.

*Excerpt from Testimony of
Revenue Officer Helen Sullivan*

Carini, did you advise him what could happen if he did not comply with the 2481?

A. Yes, I did.

Q And what, if anything, did you tell him?

A I told him that this was a Federal violation if he did not comply with the requirements, and that he could become subject to prosecution.

Q This was on August 24th, 1973. Did there come a time that you again paid a visit to Mr. Carini?

A. Yes, there was.

Q On what date was that?

A November 13th, 1973.

Q You mentioned that when you first made your initial contact in the early part of 1973, that this was at his home?

A Right.

Q He was working out of his home at that time?

A Right.

Q And what was the address of that?

A 196 Deerfield Drive.

Q At the time that you served the Form 2481, was he still working out of his home?

A No.

Q Where was he working at that time?

A 1318 East Ridge Road.

Q At the time that you made a field call in November of 1973,

*Excerpt from Testimony of
Revenue Officer Helen Sullivan*

where did you make that field call, if you recall?

A I recall that the first time I made a contact was at his home. I'm not sure at this point whether he actually had this building on Ridge Road -- you know, whether he was a tenant in the building on Ridge Road or not, but I did make the initial contact in his home.

Q When was the last field contact that you made with him prior to referring it to the Intelligence Division?

A November 13th, 1973.

Q Who did you talk to at that time?

A I believe I talked to Mrs. Carini.

Q And was there any conversation about the special tax account?

A Well, I went over payroll records with her and asked if the special account had been opened, and she showed me the bank book, that it had been opened. I believe there was one deposit made. I'm not sure if there was or not at this time. Maybe one deposit was made but no others.

Q At that time on November 13th, 1973, when you made the field call, were there any additional liabilities that were outstanding in connection with this account?

A At that time I was aware of the one quarter for the period ending June 30, 1973.

Q At that time did you know the extent of liability? Prior to that time you had estimated it at some \$4,000. Did you

*Excerpt from Testimony of
Revenue Officer Helen Sullivan*

know the exact liability at that time?

A I did know at the time, right.

Q How much was that?

A I'm referring to my notes now, because I can't remember the exact amounts. You are talking now about the liability owed when the case was assigned to me or subsequent to that?

Q No, subsequent to that, June 30th, 1973, the amounts.

A I had mentioned it was approximately \$4,000.

Q I'm referring you to the last paragraph of your notes here (indicating). Does that refresh your recollection?

A That is a little over four thousand, 4,365.01.

Q And after that field call, what, if anything, did you do?

A Well, at that time it was determined that the taxpayer had opened the special bank account but had not made the deposits, and I referred it to the Intelligence Division.

MR. HOULIHAN: That is all the questions

I have.

CROSS EXAMINATION

BY MR. LARIMER:

Q Mrs. Sullivan, you were assigned to Mr. Carini's account in early 1973, is that correct?

A I would estimate it to be about that time, right.

Q Would you say in the next month that you had quite a bit of contact with the Carinis?

A Yes, I would.

CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

C-74 - 106

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U.S.:
vs.	Gerald Houlihan
LOUIS CARINI	U.S. Courthouse 100 State Street Rochester, N.Y. 14614
Failure to deposit in separate bank account taxes withheld from employee's wages, in violation of Section 7215, Title 26, U.S.C.	
	For Defendant:
	XXXXXXXXXXXXXXXXXXXX David G. Larimer (assigned) 240 Reynolds Arcade Bldg. Rochester, N.Y. 14614
Offenses: 12/31/1971 thru 3/15/1974 10 Cts	

[illegible]

DATE	PROCEEDINGS
1974	
Mar. 15	Filed Information
Mar. 15	J.S. 2 made
Mar. 25	Arraignment. Deft. present with counsel, waives reading of the information and enters a plea of not guilty. Deft. is released on his own recog.
Apr. 30	Filed Govt's notice of motion, and motion to set a date for trial for the criminal trial calendar, ret. 5/13/1974-Roch.
May 13	Motion by Govt. to set date for trial. Adj. until 5/28/1974.
May 21	Filed Ct. Steno's minutes of 3/25/1974
May 28	Motion by Govt. to set date for trial. The Govt. is ready and advises the Court that the deft. is ready and that there is a possibility of a plea. Trial date to be fixed.
1975	
Sept. 18	Filed Government's notice of motion, motion, affidavit of service, to set a date for trial for criminal trial calendar, Ret. 10/14/1975-Roch.
Oct. 14	Motion by Govt. to set date for trial. All motions returnable 10-28-75
Oct. 28	Filed notice of motion

(OVER)

~~(OVER)~~

Criminal Docket — United States District Court

DATE	PROCEEDINGS
1975	
Oct. 28	Motion by Govt. to set date for trial. Motion by Deft to dismiss indict Adj. until 11-10-75.
Nov. 7	Filed Government's response to defendant's motion--
Nov. 24	Motion by Govt. to set date for trial. The Govt. is ready. Motion by deft. to dismiss indictment. Submitted.
1976	
Mar. 3	Filed Decision & Order denying deft's motion to dismiss--BURKE, J.
Apr. 29	Filed Govt's notice of motion to set a date for trial for criminal trial calendar, ret. 5/10/76-Roch.
May 10	Motion by Govt. to set date for trial. The Govt. is ready. Adj. at the request of the Deft. 5/24/76
May 27	Filed Cy. 5 of CJA-20 - Order appointing David G. Larimer counsel for the Deft. replacing Herbert Stern, previously retained--Burke, J.; Cy. to the Adm. office, orig. ret. to counsel for submission of voucher.
May 24	Motion by Govt. to set date for trial. Lawyer appointed last week for deft. New Motion to be filed.
1976	
Oct. 4	Filed Govt's Notice of motion and motion for an Order assigning a Judge to assume responsibility in this case so that it may be tried within the time period prescribed by the Speedy Trial Act. (18 U.S.C. Sect. 3161, et seq.); This motion is submitted to the Court for decision without oral argument
Dec. 7	Filed Govt's motion to set a date for trial.
Dec. 13	Motion by Govt. to set date for trial. The Govt. and the deft. are ready for trial. Trial date 1/27/77.
1977	
Jan. 14	Filed Deft's notice of motion for discovery and inspection and Bill of Particulars ret. 1/24/77-Roch.
Jan. 24	Motion by Deft. for discovery and inspection. Agreed to, taken off the Calendar.
Jan. 27	Govt. moves case ready for trial, before Judge Burke, at Rochester, N.Y, and the jury is duly empanelled - Witnesses testify. Trial is adj.
Jan. 28	Trial continues from yesterday with the same appearances. Jury is excuse The Deft. moves for a judgment of acquittal. Motion denied. The jury returns. The deft. rests. The jury is excused. The deft. renews motions to dismiss. Denied. Trial is adj. until Monday.
Jan. 31	Trial continues from Friday with the same appearances. The jury retires to deliberate upon their verdict. The Jury returns with the following verdict: Deft. guilty on all counts. - 1 thru 10. Sentence is deferred 2/28/77.
Feb. 28	Defendant is sentenced as follows: The Court: I impose a fine of \$500.00 on each of ten counts. The fines are remitted on all counts except the fine on the first count. Fine to be paid in two weeks BURKE, J.
Mar. 15	Filed Judgment.
Mar. 9	Filed Deft's Notice of appeal
Mar. 15	Cy. of deft's Notice of appeal, mailed to the U.S. Atty., and the CCA with statement of docket entries
Apr. 18, 1977	Filed one volume of trial transcript.
Apr. 27	original pertinent papers, clerk's certificate, index to record on appeal mailed to CCA.
May 24	

CLOSED

Criminal Docket — United States District Court

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

U. S. vs CARINI, LOUIS

74
Yr.74-106
Docket No.

Def.

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
May 24	Filed copy 2 CJA 20 voucher in the amt. of \$775.00, orig to Adm. office for payment. BURKE, J.				
June 1	Filed copy 5 CJA 20 supplemental voucher for atty. Copy 4 to Adm. Office, remaining copies to Atty. for submission of voucher. BURKE, J.				
June 8	Filed copy 2 CJA 20 voucher in the amt. of \$92.00, orig. to Adm. Office for payment. BURKE, J.				

Government's Response to Defendant's Motion

filed: Nov. 7 '75

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff

-vs-

LOUIS CARINI,

Defendant

CR. NO. 74-106

GOVERNMENT'S RESPONSE
TO DEFENDANT'S MOTION

GERALD J. HOULIHAN, Assistant United States Attorney,
deposes and says:

1. I am an Assistant United States Attorney assigned to handle this matter and am completely familiar with the facts and circumstances of this case.

2. March 15, 1974 this office filed an Information charging the defendant, Louis Carini, with ten misdemeanor counts of violating Title 26, United States Code, Section 7215.

3. Louis Carini was arraigned on March 25, 1974 before the Honorable Harold P. Burke, United States District Court, Rochester, New York and entered a plea of not guilty to the ten counts of the Information.

Contrary to the statement contained in the defendant's motion to dismiss for lack of speedy trial, the Government made a motion on April 30, 1974, thirty days after the arraignment of the defendant, to set a date for trial in this case. That motion was heard on May 28, 1974, at which time the Government stated that it was ready for trial and indicated to the court there was a possibility of a plea. This indication has been noted on the Clerk's record.

Government's Response to Defendant's Motion

4. At the time of this motion, the Government had offered to allow Mr. Carini's corporation to enter a plea of guilty to one-third of the indictment in full satisfaction of the personal indictment against Mr. Carini. In order to comply with this plea offer, Mr. Carini would have to have completely paid up all back taxes, and demonstrated to the satisfaction of the United States Attorney that he was continuing to pay his taxes in a timely manner.

5. Periodically through the period of from April 28, 1974 through October 1975, your deponent notified the defendant's attorney that the plea previously made to the defendant was not available due to a Department of Justice order prohibiting pleas by a corporation in satisfaction of charges against an officer of the corporation. Mr. Stern was advised of this orally on several occasions. Furthermore, at no time did Mr. Stern or Mr. Carini ever agree to accept the Government's offer to a reduced plea. The offer was withdrawn prior to any acceptance by the defendant.

6. On September 17, 1975, this office filed a Notice of Motion to set a date for trial in the referenced matter. This matter was set for hearing on October 14, 1975. At that time the Government indicated that it was ready for trial. The defendant at that time indicated that he was not ready to proceed but wishes additional time to make motions. The instant motion is the only motion pending before this Court at this time.

The Government has been ready for trial since the original motion thirty days after the filing of this information. The Government continues to be ready and has never indicated its unwillingness to go to trial in this matter.

A-20

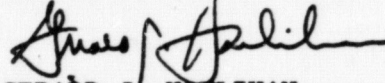
Government's Response to Defendant's Motion

7. The Government is ready, willing and able to try this case anytime.

WHEREFORE, the Government prays that the defendant's motion to dismiss be denied in all respects and that a trial date be fixed as soon as possible.

Very truly yours,

RICHARD J. ARCARA
United States Attorney

A handwritten signature in dark ink, appearing to read "Gerald J. Houlihan", written over the typed name.

By: GERALD J. HOULIHAN
Assistant United States Attorney

Excerpt from Testimony of Louis Carini

THE COURT: No. He didn't ask you that.

He said, "Did you pay Internal Revenue what you owed them?"

A I paid them a lot of money, but I am behind.

Q In fact, you are way behind all the way back to June of 1972, isn't that right?

A I'm not sure that I am behind that far. If you say so and have got the records, that could be correct.

Q And each month that you pay your employees and you withhold taxes from their salaries, you incur more debt to Internal Revenue?

A If I don't pay them, I incur the debt. If I pay the Internal Revenue, I don't incur debt.

Q It is a fact, is it not, that you haven't paid Internal Revenue each and every quarter?

A No, sir.

Q You haven't paid them?

A That is not a fact. I have paid them some quarters.

Q Some quarters?

A Yes, sir. You said that I didn't --

Q What I mean to say is, you don't pay them every quarter?

A We have missed some.

Q In fact, you missed some in September of 1972, \$2,042.32 for that quarter?

A Yes, it is possible.

Excerpt from Testimony of Louis Carini

Q And in June of 1973 for \$43,365?

A "Forty-three thousand dollars"?

Q Excuse me -- \$4,365?

A It is possible.

Q And for September of '73, \$7,525, is that right?

A I don't know.

Q For December, '73, \$3,731, do you know that?

A No, sir.

Q And you are still in business, are you not?

A Yes, sir.

Q You owe additional monies from '73 on, don't you?

A Not at all.

MR. LARIMER: Objection.

THE WITNESS: That is not correct. We are paid in full for several of those years.

MR. LARIMER: I think anything after the charge period is irrelevant.

THE COURT: Objection is overruled.

THE WITNESS: I know that we are paid in full for some of those years. The '74 and '75, I believe, are paid in full. If we missed any, it is very, very little. I think your records will show that they are practically paid in full.

THE COURT: Are you saying that you don't

Excerpt from Testimony of Louis Carini

owe the Internal Revenue any money?

A No, sir, I'm not saying that.

Q The December quarter of 1975, \$1,718?

A I think that is the only quarter we missed in '74 and '75.

Q And March of '76, some \$3,700?

A I don't know.

Q June of '76, some \$2,300?

A I don't know.

Q December, '76, some \$2,200?

A They have been paid and gone to Buffalo or Andover, and you might now know about it, just like the check we had here before.

Q This is reading from a print-out that was dated January 26, which is about two days ago. Did you make any payments in the last two days?

A No.

Q The last week?

A I don't know, sir.

Q Now the certified check here that you paid to Relin & Relin for \$1,000, you wrote that check, and it is your signature on it, is that right?

A Yes, sir.

Q And that was drawn out of your account?

A What date is it?

Q This is October 26, 1973.

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Letter of Richard J. Arcara

Cr. 74-106
GJH:jcw

September 17, 1975

Herbert Stern, Esq.
1 East Main Street
Rochester, New York 14614

Re: United States of America v. Louis Carini.
Cr. No. 74-106.

Dear Herb,

I have enclosed a Notice of Motion to set a date for trial in the referenced matter. The motion is returnable on October 14, 1975.

This will advise you that the Government would be willing to accept a plea of guilty to three misdemeanor counts of this information in full satisfaction of all charges in the information. If you are amenable to this disposition, would you please contact me so that we may have the matter placed on the calendar for October 14, 1975.

Very truly yours,

RICHARD J. ARCARA
United States Attorney

By: GERALD J. HOULIHAN
Asst. United States Attorney

Enc.

Pre-trial Proceedings

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,)
)
 - vs-)
)
 LOUIS CARINI,)
)
 Defendant.)
 - - - - -)

CR: 74-106

Transcript of proceedings had in the above-entitled matter before the HON. HAROLD P. BURKE, United States District Judge, in the United States District Court, at Rochester, New York, on Monday, October 14, 1975.

APPEARANCES:

RICHARD J. ARCARA, ESQ.
United States Attorney
(By Gerald J. Houlihan, Esq.)
Assistant United States Attorney
United States Courthouse
Rochester, New York 14614

Appearing on behalf of the Government.

HERBERT STERN, ESQ.
One East Main Street
Rochester, New York 14614

Pre-trial Proceedings

Rochester, New York

Monday, October 14, 1975

- - -

THE CLERK: United States versus Louis Carini. Motion by the Government to set date for trial.

MR. HOULIHAN: The Government is ready.

MR. STERN: I would like to put it down for the 28th. I am in the process of drawing up a motion to dismiss for failure to prosecute and not giving us a speedy trial. The case is over a year and a half old. They have never filed, I believe, a statement of readiness on it. I would like to file that motion which I will have ready --

THE COURT: What is the name of this case?

MR. HOULIHAN: United States against Louis Carini. It is a trust fund case, failure to deposit income tax into a separate account -- withholding tax.

MR. STERN: That is withholding tax, Your Honor.

THE COURT: All right. I will hear a

A-27

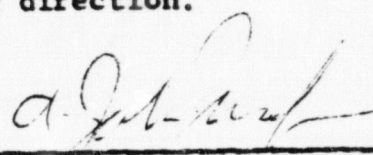
Pre-trial Proceedings

motion on the 28th of October. That is the last date to file a motion directed to the Indictment, October 28th.

- - -

REPORTER'S CERTIFICATE

I, A. Jake Jacobson, Official Court Reporter for the United States District Court for the Western District of New York, appointed pursuant to provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a full, true and correct transcript of the proceedings had in the within-entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared under my direction.



A. Jake Jacobson

Dated: June 18, 1977

Pre-trial Proceedings

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,)

-vs-)

LOUIS CARINI,)

Defendant.)

CR: 74-106

-----)

Transcript of proceedings had in the above-entitled
matter before the HON. HAROLD P. BURKE, United States
District Judge, in the United States District Court, at
Rochester, New York, on Monday, October 28, 1975.

APPEARANCES:

RICHARD J. ARCARA, ESQ.
United States Attorney
(By Gerald J. Houlihan, Esq.)
Assistant United States Attorney
United States Courthouse
Rochester, New York 14614

Appearing on behalf of the Government.

(No appearance on behalf of the Defendant.)

Pre-trial Proceedings

Rochester, New York

Monday, October 28, 1975.

- - -

THE CLERK: United States versus Louis Carini. Motion by the Government to set date for trial.

MR. HOULIHAN: Mr. Stern is the defense attorney for Mr. Carini, and he was called on Friday to appear in Federal Court in Boston and is unable to be here. Can we adjourn this until November 10th?

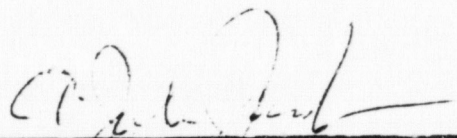
THE COURT: November 10th. So ordered.

- - -

A-30

*Pre-trial Proceedings*REPORTER'S CERTIFICATE

I, A. Jake Jacobson, Official Court Reporter for the United States District Court for the Western District of New York, appointed pursuant to provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a full, true and correct transcript of the proceedings had in the within-entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared under my direction.



A. Jake Jacobson

Dated: June 18, 1977

Pre-trial Proceedings

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	)	
	)	
- vs -	)	
	)	CR: 74-106
LOUIS CARINI,	)	
	)	
Defendant.	)	
-----	)	

Transcript of proceedings in the above-entitled
matter, before the HON. HAROLD P. BURKE, United States Dis-
trict Judge, in the United States District Court, at Rochester,
New York, on Monday, November 24, 1975.

APPEARANCES:

RICHARD J. ARCARA, ESQ.
United States Attorney
(By Gerald J. Houlihan, Esq.)
Assistant United States Attorney
United States Courthouse
Rochester, New York 14614

Appearing on behalf of the Government.

HERBERT STERN, ESQ.
One East Main Street
Rochester, New York 14614

Appearing on behalf of the Defendant.

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Pre-trial Proceedings

Rochester, New York

Monday, November 24, 1975

- - -

THE CLERK: United States versus Louis Carini. Motion by the Government to set date for trial. Motion by the defendant to dismiss the Indictment.

MR. HOULIHAN: Your Honor, the defendant submitted a motion to dismiss on failure to prosecute. The Government has filed its response to that, and we submit that to Your Honor for decision. I am ready for trial, and I saw Mr. Stern earlier, Your Honor.

May the record reflect that the Government is ready for trial, and that we submit and waive any oral argument on defendant's motion to dismiss.

THE COURT: The defendant hasn't submitted. I will give the defendant until December 8th to notify the Court in writing whether or not he submits this motion. Let the record show that this delay is caused by the defendant.

(Mr. Herbert Stern entered the

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Pre-trial Proceedings

courtroom at this time.)

THE COURT: Here is Mr. Stern now.

MR. HOULIHAN: Do you want to waive oral argument?

MR. STERN: All right. Your Honor, we are going to submit our papers on this motion to dismiss the Indictment.

THE COURT: This is a motion to dismiss?

MR. STERN: Right. We will waive our oral argument.

THE COURT: The Government is now ready for trial?

MR. HOULIHAN: Yes, Your Honor.

THE COURT: Let the record show that this delay is caused by the defendant so I can decide the motion to dismiss.

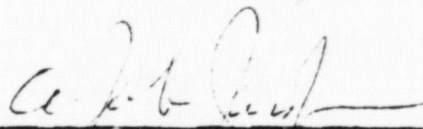
MR. STERN: All right.

- - -

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*Pre-trial Proceedings*REPORTER'S CERTIFICATE

I, A. Jake Jacobson, Official Court Reporter for the United States District Court for the Western District of New York, appointed pursuant to provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a full, true and correct transcript of the proceedings had in the within-entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared under my direction.



A. Jake Jacobson

Dated: June 18, 1977

Notice of Motion & Motion for Substitute Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

IN THE MATTER OF
THE UNITED STATES OF AMERICA

- vs -

ROBERT LANE
MATTHEW MOSS
SAMUEL J. DI GAETANO
ROGER H. RYAN
BRETT J. O'HARA
RICHARD B. CLARKE
GREGORY M. BURTON
WILLIAM G. HUNTER
PAUL H. HARTMAN
JOHN D. WILSON
GORDON L. MC KUSICK
SAMUEL J. DI GAETANO
ANTHONY RUSSO
SAMUEL FAME
HARVEY ROSENBLOOM, ET AL.
JANICE BUTLER
WALTER PRATHER
CARMINE FIORENTINO
JAMES WILSON
REED AND JANICE HARTFORD
HOMER TUCKER
ANGELO MONACHINO
✓ EDWARD WELDON
LOUIS CARINI
LAURENCE AND CLARA CHEVALIER
JEFFREY SPINNING
JOHN DE GOLYER
ANTHONY OLIVERI AND PAUL COMFORT
GEORGE ULMER II
LUBERTHA HAMPTON
DAVID BRYANT
WILLIE BALKUM
JOHN T. KITOS
SEBASTIAN CHIAPPONE
DENNIS YATES
THOMAS GORNEY
TERRY SHAW
CHARLES JAMES WRIGHT
PERRY PAUL TITUS
G. ROLFE SCOFIELD
J. HAROLD MC CONNELL
ADEN R. CHAFFER
JAMES LORD AND GERALD YAGY

CR. NO. 72-31
CR. NO. 72-153
CR. NO. 72-453
CR. NO. 73-18
CR. NO. 73-46
CR. NO. 73-51
CR. NO. 73-55
CR. NO. 73-56
CR. NO. 73-66
CR. NO. 73-78
CR. NO. 73-82
CR. NO. 73-127
CR. NO. 73-141
CR. NO. 73-149
CR. NO. 73-150
CR. NO. 73-187
CR. NO. 73-280
CR. NO. 73-323
CR. NO. 73-332
CR. NO. 74-41
CR. NO. 74-42
CR. NO. 74-55
CR. NO. 74-73
CR. NO. 74-106
CR. NO. 74-316
CR. NO. 75-20
CR. NO. 75-66
CR. NO. 75-87
CR. NO. 75-155
CR. NO. 75-189
CR. NO. 75-190
CR. NO. 75-191
CR. NO. 75-199
CR. NO. 76-48
CR. NO. 76-75
CR. NO. 76-77
CR. NO. 76-81
CR. NO. 76-81
CR. NO. 76-82
CR. NO. 76-105
CR. NO. 76-129
CR. NO. 76-130
CR. NO. 76-131

RECEIVED

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CLERK U.S.D.C. WDNY

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Notice of Motion & Motion for Substitute Judge

NOTICE OF MOTION

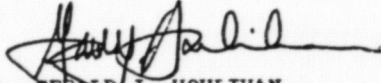
GENTLEMEN:

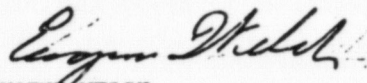
PLEASE TAKE NOTICE that upon the grounds set forth in the enclosed Motion and the record in the above-captioned cases, the United States is moving for an Order assigning one or more judges to assume responsibility for the above-captioned cases and is submitting this Motion to the Court for decision without oral argument.

Dated at Rochester, New York, September 30, 1976.

Yours very truly,

RICHARD J. ARCARA
United States Attorney


By: GERALD J. HOULIHAN
Asst. United States Attorney


By: EUGENE WELCH
Asst. United States Attorney

TO: All attorneys on the attached list.

Notice of Motion & Motion for Substitute Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

IN THE MATTER OF :
THE UNITED STATES OF AMERICA :

- vs -

ROBERT LANE	:	CR. NO. 72-31
MATTHEW MOSS	:	CR. NO. 72-153
SAMUEL J. DI GAETANO	:	CR. NO. 72-453
ROGER H. RYAN	:	CR. NO. 73-18
BRETT J. O'HARA	:	CR. NO. 73-46
RICHARD B. CLARKE	:	CR. NO. 73-51
GREGORY M. BURTON	:	CR. NO. 73-55
WILLIAM G. HUNTER	:	CR. NO. 73-56
PAUL H. HARTMAN	:	CR. NO. 73-66
JOHN D. WILSON	:	CR. NO. 73-78
GORDON L. MC KUSICK	:	CR. NO. 73-82
SAMUEL J. DI GAETANO	:	CR. NO. 73-127
ANTHONY RUSSO	:	CR. NO. 73-141
SAMUEL FAME	:	CR. NO. 73-149
HARVEY ROSENBLUM, ET AL.	:	CR. NO. 73-150
JANICE BUTLER	:	CR. NO. 73-187
WALTER PRATHER	:	CR. NO. 73-280
CARMINE FIORENTINO	:	CR. NO. 73-323
JAMES WILSON	:	CR. NO. 73-332
REED AND JANICE HARTFORD	:	CR. NO. 74-41
HOMER TUCKER	:	CR. NO. 74-42
ANGELO MONACHINO	:	CR. NO. 74-55
EDWARD WELDON	:	CR. NO. 74-73
LOUIS CARINI	:	CR. NO. 74-106
LAURENCE AND CLARA CHEVALIER	:	CR. NO. 74-316
JEFFREY SPINNING	:	CR. NO. 75-20
JOHN DE GOLYER	:	CR. NO. 75-66
ANTHONY OLIVERI AND PAUL COMFORT	:	CR. NO. 75-87
GEORGE ULMER II	:	CR. NO. 75-155
LUBERTHA HAMPTON	:	CR. NO. 75-189
DAVID BRYANT	:	CR. NO. 75-190
WILLIE BALKUM	:	CR. NO. 75-191
JOHN T. KITOS	:	CR. NO. 75-199
SEBASTIAN CHIAPPONE	:	CR. NO. 76-48
DENNIS YATES	:	CR. NO. 76-75
THOMAS GORNEY	:	CR. NO. 76-77
TERRY SHAW	:	CR. NO. 76-81
CHARLES JAMES WRIGHT	:	CR. NO. 76-81
PERRY PAUL TITUS	:	CR. NO. 76-82
G. ROLFE SCOFIELD	:	CR. NO. 76-105
J. HAROLD MC CONNELL	:	CR. NO. 76-129
ADEN R. CHAFFER	:	CR. NO. 76-130
JAMES LORD AND GERALD YAGY	:	CR. NO. 76-131

*Notice of Motion & Motion for Substitute Judge*MOTION FOR SPEEDY TRIAL

THE UNITED STATES OF AMERICA, by and through its attorneys, Richard J. Arcara, United States Attorney for the Western District of New York, and Gerald J. Houlihan and Eugene Welch, Assistant United States Attorneys, hereby makes application for an Order assigning one or more judges to assume responsibility for the above-captioned cases so that they may be tried within the time period prescribed by the Speedy Trial Act (18 U.S.C. §3161 et. seq.). And as grounds in support of this Application, the Government sets forth the following facts and circumstances:

1. The above-captioned indictments have all been returned by the federal grand juries sitting principally in Rochester, New York; and they involve defendants and witnesses located principally in the Rochester area. They have been assigned to the Honorable Harold P. Burke for trial. The Government filed notices of readiness in all of the cases or otherwise notified the Court and counsel of its readiness and has in fact been prepared to try each case as of the date of such notices.

2. On or about September 16, 1976 the Honorable Harold P. Burke was required to enter the hospital for surgery. It is anticipated that a minimum of some six weeks will be required for recuperation. Prior to entering the hospital Judge Burke advised Government counsel that he had no objection to a visiting judge being assigned for purposes of trying cases on his docket, some of which he had previously scheduled for trial between October 1, 1976 and January 1, 1977. As of September 28, 1976 Judge Burke advised government counsel through his secretary that he would not return to the bench at least until November 8, 1976, and then only for motions. He cancelled all scheduled trials for the rest of the year.

Notice of Motion & Motion for Substitute Judge

3. Specifically the cases are:

- (1) Cr. No. 72-31. U.S. v. Robert Lane.
Indicted February 17, 1972. Violation:
26 U.S.C. 7203. Failure to File Income
Tax Returns.
- (2) Cr. 72-153. U.S. v. Matthew Moss.
Indicted September 5, 1972. Violation:
50 App. U.S.C. 462(a). Selective Service
Act.
- (3) Cr. 72-453. U.S. v. Samuel J. DiGaetano.
Sealed Indictment December 7, 1972. Unsealed
January, 1973. Violation: 18 U.S.C. 1341.
Mail Fraud.
- (4) Cr. 73-18. U.S. v. Roger H. Ryan.
Indicted January 4, 1973. Violation:
50 App. U.S.C. 462. Selective Service Act...
- (5) Cr. 73-46. U.S. v. Brett J. O'Hara.
Indicted January 18, 1973. Violation:
50 App. U.S.C. 462. Selective Service Act...
- (6) Cr. 73-51. U.S. v. Richard B. Clarke.
Indicted January 18, 1973. Violation:
50 App. U.S.C. 462. Selective Service Act.
- (7) Cr. 73-55. U.S. v. Gregory M. Burton.
Indicted January 18, 1973. Violation:
50 App. U.S.C. 462. Selective Service Act.
- (8) Cr. 73-56. U.S. v. William G. Hunter.
Indicted January 18, 1973. Violation:
50 App. U.S.C. 462(a). Selective Service Act.
- (9) Cr. 73-66. U.S. v. Paul H. Hartman.
Indicted January 18, 1973. Violation:
50 App. U.S.C. 462(a). Selective Service Act.

Notice of Motion & Motion for Substitute Judge

- (10) Cr. 73-78. U.S. v. John D. Wilson.
Indicted January 18, 1973. Violation:
50 App. U.S.C. 462(a). Selective Service Act.
- (11) Cr. 73-82. U.S. v. Gordon L. McKusick.
Indicted January 18, 1973. Violation:
50 App. U.S.C. 462. Selective Service Act.
- (12) Cr. 73-127. U.S. v. Samuel J. DiGaetano.
Indicted March 15, 1973. Violation:
Mail Fraud and Income Tax Evasion.
- (13) Cr. 73-141. U.S. v. Anthony Russo.
Indicted March 29, 1973. Violation:
18 U.S.C. 1510. Perjury.
- (14) Cr. 73-149. U.S. v. Samuel Fame.
Indicted March 30, 1973. Violation:
26 U.S.C. 7201. Income Tax Evasion.
- (15) Cr. 73-150. U.S. v. Harvey Rosenbloom, et al.
Indicted March 29, 1973. Violation:
18 U.S.C. 224. Race Fixing.
- (16) Cr. 73-187. U.S. v. Janice Butler.
Indicted May 4, 1973. Violation:
18 U.S.C. 2312. Stolen Car.
- (17) Cr. 73-280. U.S. v. Walter Prather.
Indicted August 8, 1973. Violation:
18 U.S.C. 2113. Bank Larceny.
- (18) Cr. 73-323. U.S. v. Carmine Fiorentino.
Indicted October 4, 1973. Violation:
18 U.S.C. 1001. Fraudulent Travel Vouchers
to Small Business Administration.
- (19) Cr. 73-332. U.S. v. James Wilson.
Indicted October 4, 1973. Violation:
18 U.S.C. 495. Forged U.S. Treasury Check.

Notice of Motion & Motion for Substitute Judge

- (20) Cr. 74-41. U.S. v. Reed and Janice Hartford.
Indicted February 1, 1974. Violation:
18 U.S.C. 1001. Flood Fraud S.B.A. Loan.
- (21) Cr. 74-42. U.S. v. Homer Tucker.
Indicted February 1, 1974. Violation:
18 U.S.C. 1001. Flood Fraud S.B.A. Loan.
- (22) Cr. 74-55. U.S. v. Angelo Monachino.
Indicted February 25, 1974. Violation:
26 U.S.C. 7215. IRS Trust Fund.
- (23) Cr. 74-73. U.S. v. Edward Weldon.
Indicted March 5, 1974. Violation:
26 U.S.C. 7215. IRS Trust Fund.
- (24) Cr. 74-106. U.S. v. Louis Carini.
Indicted March 15, 1974. Violation:
26 U.S.C. 7215. IRS Trust Fund.
- (25) Cr. 74-316. U.S. v. Laurence & Clara Chevalier.
Indicted December 9, 1974. Violation:
18 U.S.C. 1001. Flood Fraud S.B.A. Loan.
- (26) Cr. 75-20. U.S. v. Jeffrey Spinning.
Indicted January 23, 1975. Violation:
21 U.S.C. 846. Drug Abuse Control Act.
- (27) Cr. 75-66. U.S. v. John DeGolyer.
Indicted March 11, 1975. Violation:
26 U.S.C. 7203. Failure to File Tax Returns.
- (28) Cr. 75-87. U.S. v. Anthony Oliveri & Paul Comfort.
Indicted April 3, 1975. Violation:
18 U.S.C. 495. Interstate Transportation
of Stolen Property.
- (29) Cr. 75-155. U.S. v. George Ulmer II.
Information filed July 2, 1975. Violation:
26 U.S.C. 7203. Failure to File Tax Returns.
- (30) 75-189. U.S. v. Lubertha Hampton.
Indicted July 31, 1975. Violation:
21 U.S.C. 841 (a)(1). Drug Abuse Control Act.

Notice of Motion & Motion for Substitute Judge

- (31) Cr. 75-190. U.S. v. David Bryant.
Indicted August 1, 1975. Violation:
18 U.S.C. 2113. Bank Robbery.
- (32) Cr. 75-191. U.S. v. Willie Balkum.
Indicted August 1, 1975. Violation:
21 U.S.C. 841(a)(1). Drug Abuse Control Act.
- (33) Cr. 75-199. U.S. v. John Kitos.
Information Filed August 15, 1975. Violation:
26 U.S.C. 7203. Failure to File Tax Returns.
- (34) Cr. 76-48. U.S. v. Sebastian Chiappone.
Indicted April 9, 1976. Violation:
26 U.S.C. 7206. Subscribing to False
Tax Returns.
- (35) Cr. 76-75. U.S. v. Dennis Yates.
Indicted June 10, 1976. Violation:
18 U.S.C. 2312. Interstate Transportation
of a Stolen Motor Vehicle.
- (36) Cr. 76-77. U.S. v. Thomas Gorney.
Indicted June 10, 1976. Violation:
18 U.S.C. 2314. Interstate Transportation of
Forged Securities.
- (37) Cr. 76-81. U.S. v. Terry Shaw.
Arrested April 1, 1976. Indicted June 10, 1976.
Violation: 21 U.S.C. 841, 846. Drug Abuse
Control Act.
- (38) Cr. 76-81. U.S. v. Charles James Wright.
Arrested April 1, 1976. Indicted June 10, 1976.
Violation: 21 U.S.C. 841, 846. Drug Abuse
Control Act.
- (39) Cr. 76-82. U.S. v. Perry Paul Titus.
Arrested May 27, 1976. Indicted June 10, 1976.
Violation: 18 U.S.C. 922(a)(6) and 18 U.S.C.
App. 1202. False Statements in Acquisition of
and Possession of a Firearm by a Convicted Felon.

Notice of Motion & Motion for Substitute Judge

- (40) Cr. 76-105. U.S. v. G. Rolfe Scofield.
Information Filed July 1, 1976. Violation:
26 U.S.C. 7215. IRS Trust Fund.
- (41) Cr. 76-129. U.S. v. J. Harold McConnell.
Indicted July 29, 1976. Violation:
18 U.S.C. 1005. False Entry in Bank Records.
- (42) Cr. 76-130. U.S. v. Aden R. Chaffer.
Indicted July 29, 1976. Violation:
18 U.S.C. 656, 1005. False Entries in Bank
Records and Misapplication of Bank Funds.
- (43) Cr. 76-111. U.S. v. James Lord & Gerald Yagy.
Arrested July 21, 1976. Indicted July 29, 1976.
Violation: 18 U.S.C. 2113. Bank Robbery.

4. In addition to these cases the Strike Force
Office in Rochester has a large number of cases in a ready posture.

5. It is apparent to the Government that Judge Burke's absence will inexorably delay the trial of each of the scheduled and unscheduled cases herein for a substantial period of time. Under these circumstances the Government anticipates that it may be impossible to comply with the requirements of the Speedy Trial Act unless one or more judges is temporarily appointed to bring these cases to trial expeditiously. The Government notes that the docket in Rochester is already congested and that congestion is not a reason for denying the Government and the Defendant a right to a speedy trial under the terms of the Act. The Government therefore is obliged to make every effort to obviate what could be an extremely serious situation jeopardizing the viability of these important cases.

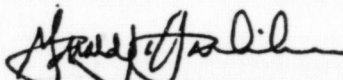
WHEREFORE, the United States of America requests that the Chief Judge of the United States District Court for the Western District of New York promptly arrange for the temporary assignment of one or more judges to Rochester in the absence of

Notice of Motion & Motion for Substitute Judge

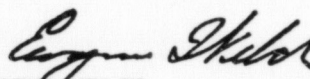
Judge Burke in order that the provisions of the Speed Trial Act may be met; and the Government prays for such further relief as may be necessary and in the interest of justice.

Respectfully submitted,

RICHARD J. ARCARA
United States Attorney



By: GERALD J. HOULIHAN
Asst. United States Attorney

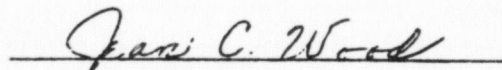


By: EUGENE WELCH
Asst. United States Attorney

Dated at Rochester, New York, September 30, 1976.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above Notice of Motion and Motion was mailed to the following attorneys for the following Defendants at the following addresses on October 1 1976.


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Notice of Motion & Motion for Substitute Judge

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Pre-Trial Proceedings

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	)	
	)	
-vs-	)	
	)	CR: 74-106
LOUIS CARINI,	)	
	)	
Defendant.	)	
-----	)	

Transcript of proceedings in the above-entitled matter
before the HON. HAROLD P. BURKE, United States District Judge,
in the United States District Court, at Rochester, New York,
on Monday, December 13, 1976.

APPEARANCES:

RICHARD J. ARCARA, ESQ.
United States Attorney
(By Gerald J. Houlihan, Esq.)
Assistant United States Attorney
United States Courthouse
Rochester, New York 14614)

Appearing on behalf of the Government.

DAVID G. LARIMER, ESQ.
240 Reynolds Arcade Building
Rochester, New York 14614

Appearing on behalf of the Defendant.

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Pre-Trial Proceedings

Rochester, New York

Monday, December 13, 1976

- - -

THE CLERK: United States versus Louis Carini. Motion by the Government to set date for trial.

MR. HOULIHAN: The Government is ready for trial, Your Honor.

MR. LARIMER: The defendant is also ready, Your Honor.

THE COURT: January 27th.

What is the name of the defendant?

MR. HOULIHAN: Louis Carini. And this is also a trust fund violation of the Internal Revenue Code.

THE COURT: January 27th.

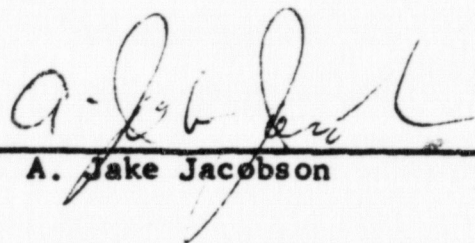
MR. LARIMER: Thank you, Your Honor.

- - -

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*Pre-Trial Proceedings***REPORTER'S CERTIFICATE**

I, A. Jake Jacobson, Official Court Reporter for the United States District Court for the Western District of New York, appointed pursuant to provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a full, true and correct transcript of the proceedings had in the within-entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared under my direction.



A. Jake Jacobson

Dated: June 18, 1977

Renewal of Motion to Dismiss

Rochester, New York

Thursday, January 27, 1977

10:00 a.m.

- - -

MR. LARIMER: Before the jury comes in, I would like to renew a motion that was made earlier in the case, Your Honor, just before the jury is brought in.

THE COURT: We might as well do it right now before the jury comes in.

MR. LARIMER: Your Honor, this is in the case of United States versus Louis Carini. For the record, my name is David Larimer, Your Honor, and I was appointed in this case last May of 1976. Prior to that Mr. Carini had retained counsel, Herbert Stern. Mr. Stern made a motion about October, 1975, to dismiss this case for want of a speedy trial.

The Court, in March of 1976, denied that motion in all respects. At this time I would renew that motion made by Mr. Stern to dismiss the case for want of a speedy trial, since the case is now approximately three years old since the time the Information was filed.

THE COURT: I deny the motion.

Excerpt from Testimony of Nick Glamack

Q And under what circumstances have you known Mr. Carini?

A I have been his pastor for the these two years.

Q Is he a member of your church, then?

A Yes. He has been for a number of years.

Q How large a congregation do you have?

A Four hundred, approximately, in attendance.

Q Other than being a member of your congregation, did Mr. Carini fulfill any other duties at the church?

A Yes. He has been a member of the Board of Deacons for a number of years, about eighteen years.

Q Perhaps you can tell us how does one become a member of the Board of Deacons?

A He is elected by the congregation, by a vote of the congregation.

Q What function does the Board of Deacons have in your church?

A Well, they handle the property as trustees, and they handle church discipline and matters of church business.

Q Is this a position of trust in the church?

A Yes.

Q During the two years that you have known Mr. Carini, have you had occasion to hear other members of your congregation speak about Mr. Carini?

A Yes.

Q How often, would you say?

Excerpt from Testimony of Nick Glamack

A Well, there have been a number of times when I have had people speak highly of him because of his service in the church. He also has served for a number of years as Sunday School teacher and worker.

Q What is your opinion as to his reputation in the community--

THE COURT: Character evidence is not opinion evidence. It is factual evidence as to his reputation in the community for truth and veracity.

Q Yes. What is Mr. Carini's reputation in the community for truth and veracity?

A Well, it is perfect, to my knowledge. Everything that I have heard about Mr. Carini has been high commendation.

MR. LARIMER: Thank you. I have no further questions.

CROSS EXAMINATION

BY MR. HOULIHAN:

Q Reverend Morris, when you had the conversations with the people who speak so highly of Mr. Carini, was there any conversation about how much money he owed the Internal Revenue Service?

A No, sir.

Q Was there any conversation about the money that had been withheld from employees' wages but not paid to the Internal Revenue Service?

Excerpt from Testimony of Nick Glamack

A No, sir.

Q Do you have any knowledge at all about that?

A No, sir, only what I have heard the last day or two when I was asked if I would come.

MR. HOULIHAN: Thank you. No further questions.

MR. LARIMER: I have nothing further.

(Witness excused.)

MR. LARIMER: I will call Mr. Nick Glamack.

N I C K G L A M A C K,

called as a witness by the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LARIMER:

Q Mr. Glamack, where do you presently live?

A I live at 1206 Mile Square Road in Mendon, New York.

Q And what is your occupation?

A I am a realtor.

Q And how long have you been in that business?

A Bordering thirty years.

Q During that time have you had occasion to know Mr. Louis Carini?

A Yes, sir.

Q How long have you known him?

Excerpt from Testimony of Nick Glamack

A Approximately fourteen years.

Q And in what capacity or connection did you come to know Mr. Carini?

A Through attendance at Bethel Gospel Church was the first time.

Q Subsequent to that, have you had other dealings with Mr. Carini?

A I have sold real estate for him and to him.

Q Put most of your dealings with him have been through the church?

A No, sir. At that time he was employed at Eastman Kodak, and several years after that, maybe four years, he decided to enter into the contracting business, and through that, I referred a number of clients for building jobs and several of them have been granted to the Carini Construction Company, and all of them have been thoroughly satisfied with the workmanship and contractual agreement, as far as I know.

Q During your acquaintance with Mr. Carini, have you heard others of your acquaintance talk about Mr. Carini, about his truthfulness and veracity?

A Yes, sir.

Q What is his reputation in the community for truthfulness and veracity?

A Beyond reproach.

Excerpt from Testimony of Nick Glamack

MR. LARIMER: I have nothing further.

CROSS EXAMINATION

BY MR. HOULIHAN:

Q Mr. Glamack, at the time that you discussed and knew the reputation of Mr. Carini, were you aware that he was withholding taxes from employees' salaries and did not pay them over to the Internal Revenue Service?

A Just because of this here, yes, just that.

Q So your knowledge of his reputation was without the benefit of the knowledge that he wasn't paying taxes that he had already withheld from employees' wages?

A I think that was a personal matter. He wouldn't discuss that with people outside of his business, I don't think.

MR. HOULIHAN: Thank you. No further questions.

MR. LARIMER: I have nothing further.

(Witness excused.)

MR. LARIMER: Your Honor, that concludes the defendant's case, except I believe there were two other Exhibits that I have not yet moved in evidence, Defendant's Exhibits 1 and 2 which I would move at this time.

MR. HOULIHAN: I have no objection.

THE COURT: They are received.

(Defendant's Exhibits 1 and 2 marked in

Excerpt from Testimony of Louis Carini

MR. LARIMER: Very well.

Q Mr. Carini, as to the checks which Mr. Houlihan questioned you about, they were made before you received the notice in August of 1973, and it was a \$1,697 check payable July 27th to Spencer Walker, a \$1,000 check payable August 6th to the Internal Revenue Service, and a \$1,500 check payable August 7th to Relin & Relin. What effect did those payments have on your ability to pay the Internal Revenue Service after you got the notice two or three weeks later?

A Well, it made it impossible, because I was operating a business with fifteen men with zero balance in my checking accounts. When I had to go buy materials, I had to have cash, and if I would have had at least \$5,000 to operate with, it would have been easier to earn money and easier to pay IRS, but there were times I had materials on the loading dock at Boss-Linco, and I couldn't get it off the dock. It was C.O.D. There were times that I had to send our men home until we got money. Then I spent a day calling people up who owed me money and driving around, and it made it very, very difficult and almost impossible. There were times when it seemed like a sensible thing that I might do was to quit, but I knew I would never pay the bills if I didn't have the business.

Q You intend to pay all the bills that are owing?

Excerpt from Testimony of Shirley Carini

November of 1973?

A Yes, we did.

Q And about how many jobs did you have going at that time that you recall?

A I really don't recall. They were not large construction jobs at that time. They were for individual homeowners.

Q Would it be more than ten or more than twenty?

A It might be approximately one or one and a half a week.

Q One or one and a half a week?

A Yes.

Q Throughout this period of time?

A Yes.

Q Do you know the cost of materials during this period of time that you had to pay?

A No, I don't.

Q In any event, you did have to pay cash for your materials because they wouldn't just deliver them without you paying cash?

A Right.

MR. HOULIHAN: Thank you. I have nothing further.

MR. LARIMER: I have nothing further.

(Witness excused.)

MR. LARIMER: Your Honor, I have a few short witnesses, but they won't be here

Excerpt from Testimony of Louis Carini

A Absolutely, many times.

Q This happened many times in 1973?

A Yes, sir.

Q What happened when that would occur?

A We would get a letter from the bank saying, "Your account is attached," so therefore, my employees couldn't cash their checks, and so I would have to immediately call up the attorney involved, and he would either get paid in full -- usually, a marshal would be waiting at the bank, and if I made any deposits the day before, he would find out and then he would call his attorney and say, "Carini has \$2,000 in his account," and if he had a judgment for \$1,800, they would attach it.

Q Would that prevent you from writing any checks for the \$1,800?

A Absolutely.

Q You tried to make some arrangement with the attorney to get this lifted?

A Right, and sometimes they would say the bank would have something like three or four days and then they automatically would write the checks to that lawyer, but I couldn't wait three or four days, or I couldn't do business. So I run down to the attorney's office, and sometimes I would compromise. I would say, "Can't you just take a thousand today and a thousand next week?" Sometimes they would say,

Excerpt from Testimony of Revenue Officer Helen Sullivan

A \$4,836.48.

Q What kind of taxes are represented by that amount of money?

A That consists of FICA wages and income tax withheld from employer's wages.

Q And the FICA was what?

A Social Security.

Q After being assigned to that case, did there come a time that you made contact with Carini Construction Company?

A Yes.

Q And when was that, if you can recall?

A I would say the early part of 1973.

Q Was this personal contact or a telephone contact?

A I made what we call a "field contact." At that time Mr. Carini was conducting his business out of his home at 196 Deerfield Drive.

Q Did there come a time that you had a meeting with Mr. Carini concerning the payment of the back taxes that were due and owing?

A Yes. Sometime in April of 1973 I met with Mr. Carini and an agreement was set up whereby he would remit \$1,000 per month on the delinquent taxes starting May 15th, 1973.

Q He agreed to make these \$1,000 payments, is that right?

A Correct.

Q Was this to cure up some \$4,800 of liability?

A Right.

Excerpt from Testimony of Special Agent Ronald Wheeler

Q What are the duties of a Special Agent?

A A Special Agent is to conduct investigations for possible criminal violations of Federal tax laws.

Q Are you stationed in the Rochester Office?

A Yes, I am.

Q Did there come a time in the course of your duties as a Special Agent that you were assigned to an investigation involving Louis Carini?

A Yes, there was.

Q When was that?

A That was approximately the 14th of November, 1973.

Q What, if anything, did you do in connection with that investigation?

A I started out by interviewing Mr. Carini himself on the 15th of November, 1973.

Q Where did this interview take place?

A At his place of business on Ridge Road in Rochester.

Q And who was present at the time?

A There was myself. There was Mrs. Sullivan, the Revenue Agent; Mr. Carini and Mr. Carini's wife.

Q And what, if anything, did you say to Mr. Carini when you went there?

A When I got to his place of business, I identified myself as a Special Agent with the Intelligence Division, and I displayed my credentials for him to see. I then told him

Excerpt from Testimony of Special Agent Ronald Wheeler

Q Yes, sir.

A The rest of the checks we eventually returned to Mr. Carini.

Q Did you make more copies of the checks other than what has been introduced in evidence here?

A I can't say for certain whether I did or not.

Q You didn't just rely on the week ending day as the pay day, did you?

A No, I did not.

Q And, again, even if you relied upon the checks in question, G-10 and G-11, you were relying on the date the check was written, correct?

A To the best of my knowledge, that is the date that I relied on, yes.

Q Isn't it conceivable that the check could have been written on the 20th and given to the employee on the 21st or the 22nd?

A I suppose it is conceivable.

Q Did you ask Mr. Carini about these employees and when he paid them, or did you ask any of the employees when they got paid?

A I don't believe I did talk to the employees.

Q Did Mr. Carini show you some other book that he had, a recordation of when he paid his employees?

A I don't recall whether he did or not.

Q These figures that you compiled on these summaries, were

Affidavit of Service

Monroe County's
Business/Legal Daily Newspaper
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Rochester, New York 14608
Correspondence P.O. Box 6, 14601
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Johnson D. Hay / Publisher
Russell D. Hay / Board Chairman

The Daily Record

July 8, 1977

Re: United States of America vs. Louis Carini

State of New York)
County of Monroe) ss.:
City of Rochester)

William Lipson
Acting Production Manager

Being duly sworn, deposes and says: That he is associated with The Daily Record Corporation of Rochester, New York, and is over twenty-one years of age.

That at the request of

Gerald Houlihan, Esq.

Attorney(s) for

Appellee

On July 8, 1977

(s)he personally served three (3) copies of the printed ☐ Record ☒ Brief ☐ Appendix
of the above entitled case addressed to:

David Larimer, Esq.
240 Reynolds Arcade Bldg.
Rochester, New York 14614

☐ By depositing true copies of the same securely wrapped in a postpaid wrapper in a Post Office maintained by the United States Government in the City of Rochester, New York.

☒ By hand delivery

William Lipson x

Sworn to before me this 8th day of July 1977

Thomas S. King

Notary Public
~~Commissioner of Deeds~~